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No. 1031

In the Supreme Court of the United States

OCTOBER TERM, 1967

HENRY H. BENDER AND MYRTLE BENDER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner[1] owned an 80 percent interest in real estate that was leased to the Kroger Company, which used it in a grocery operation. At the end of the lease term, Kroger insisted that additional parking facilities be provided as a condition of renewal. The lessors therefore purchased two adjacent lots on which were three houses. Because the sellers knew of Kroger's need for parking facilities, the purchase price of some $75,000 was more than twice the value of the lots and buildings as appraised by petitioner's realtor. After the purchase, the lots were cleared, and, together with the original premises, leased to Kroger for

[1] Mrs. Bender is a party only because joint returns were filed, and Mr. Bender will be referred to as the petitioner.

a 10-year term, at a rental that was designed to compensate the lessors for the cost of acquiring the adjacent lots. (Pet. 23a–24a.)

In his tax returns for 1959 through 1961, petitioner sought to amortize, as his share of the alleged cost of the [redacted] demolished buildings, 80 percent of all expenditures, including the cost of demolition and attorney's fees, above the $4,100 value the lessors' realtor assigned as the value of the land. Those amounts were claimed to be expenses incurred for the production of income within the meaning of Section 212 of the Internal Revenue Code, or ordinary business expenses under Section 162 of the Code. (Pet. 24a.)

The Commissioner of Internal Revenue disallowed the claim on the theory that the entire expenditures were expenditures which should be allocated solely to the land. Petitioner paid the deficiencies assessed. The district court ruled in his favor in his resulting suit for refund, but the court of appeals reversed.[2]

This decision is correct. There is no conflict or any other basis for review in this Court.

Land is concededly not a depreciable asset. The only question here is how much of the lessors' purchase price should be allocated to the land. The case is controlled by Section 1.165–3 of the income tax Regulations under the 1954 Code, the basic provisions of which may be traced back to Article 142 of Treas. Regs. 45 (1919 ed.), promulgated under the Revenue Act of 1918, c. 18, 40 Stat. 1057. The regulation provides that when a taxpayer purchases improved real estate with the intention of demolishing the structures, the entire

[2] The opinion of the court of appeals is reported at 383 F. 2d 656.

cost of the property, including his cost of demolition, is the actual cost of acquiring the land and should be allocated to it. The only allowable depreciation can be with respect to the cost of whatever structure is erected on the land after clearance. There is no dispute over the fact that petitioner and the other lessors who purchased these properties had the requisite intention when they purchased the property.[3] The courts are unanimous in holding that in this situation the regulation requires the result reached below, see *e.g., Meyer* v. *United States,* 247 F. Supp. 939 (D. Mass.), affirmed *per curiam,* 362 F. 2d 264 (C.A. 1).

Petitioner contends (Pet. 7–9) that the Regulation Section 1.165–3 deals only with losses and not with amortization. However, that contention ignores the wording of the regulation, which plainly requires that in a situation such as the one at bar the entire cost must be allocated to the land alone.

There is no conflict with *Camp Wolters Land Company* v. *Commissioner,* 160 F. 2d 84 (C.A. 5). There the taxpayer purchased buildings but not the underlying land, which others owned. Regulation Section 1.165–3 of necessity applies only when land and improvements are purchased together.

Nor does petitioner have a wasting asset amortizable over the 10-year term of his leasehold. To be sure, the capital costs incurred in securing a new lease or insuring the renewal of an existing lease may be in appropriate circumstances amortized over the term of the lease. Thus in *Post* v. *Commissioner,* 109 F. 2d 135 (C.A. 2),

[3] Thus there is no merit to petitioner's claim (Pet. 9–10) that the court of appeals improperly overturned a material factual finding of the district court.

the taxpayer was allowed to amortize his cost basis, less previously claimed depreciation, in a structure he demolished at the insistance of a prospective lessee. But there the intention to demolish did not arise until some time after the property was purchased, so that the long standing provision of Regulation Section 1.165.3 did not require, as it does here, the allocation of such amounts to the cost basis of land, which is plainly a nonwasting asset as to which neither depreciation nor amortization may be taken.[4] See, also, *Spinks Realty Co.* v. *Burnet,* 62 F. 2d 860 (C.A.D.C.). In the instant case, however, the land was purchased with the intention to demolish the buildings.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Petitioner here has made no showing that a discrete part of the price he and his co-lessors paid was the cost of intangible property that would have no value at the end of Kroger's renewal term. Compare Rubin, *Depreciation of Property Purchased Subject to a Lease*, 65 Harv L. Rev. 1134 (1952). See, also, Casenote, 65 Mich. L. Rev. 366, 371–372. Accordingly, there is no basis in this record for a contention that part of the purchase price can be isolated as the cost of an independent wasting intangible asset with a useful life limited to the term of the lease.

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